No. 341. 59.

Brief of Rose v Rose for D.

Filed April 26, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 341.

MARGARET A. MUSE ET AL., - - Plaintiffs in Error,

v.

ARLINGTON HOTEL COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION.

Brief for Defendant in Error.

U. M. ROSE,
G. B. ROSE,
For Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 341.

MARGARET A. MUSE ET AL., - - *Plaintiffs in Error,*

v.

ARLINGTON HOTEL COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION.

Brief for Defendant in Error.

The statute of Arkansas regulating proceedings in ejectment is copied in our brief on motion to dismiss, which was filed some days ago.

For exceptions to documentary evidence see transcript, p. 8.

For demurrer see id., p. 25.

As the exceptions and the demurrer stand substantially on the same ground, one argument may serve for both.

The pretended survey in this case purports to have been made by Carlos Trudeau. Many forged Spanish claims, purporting to have been indorsed by him, have been before the courts.

U. S. *v.* King, 3 How., 773.

A large number of decrees of confirmations of Spanish claims were rendered in the Superior Court of the Territory of Arkansas. It being suspected that these claims were forged, Congress, on the 8th of May, 1830, passed an act authorizing bills of review to be filed in the cases. The reported case arising on the bills of review is U. S. *v.* Samperyac, Hempst., 143, and this seems to have disposed of sixty-six other cases of forged claims. How many other cases there may have been we know not; the records of the superior court having been destroyed by fire many years ago. The fact of the forgery was clearly established. The court said: "In investigating frauds like these the mind sickens and the feelings revolt." By the time that the case got to this court (Samperyac *v.* U. S., 7 Pet., 222) it was conceded that the grantee in the forged grant, Samperyac, was a fictitious person. In this litigation, one John J. Bowie, ostensible assignee of Samperyac, figured largely. In the case now before the court, the claim is said to have been long in the hands of one Rezin P. Bowie (Tr., 16). The coincidence of names is suggestive. However it is but fair to say that the complaint sets forth that Rezin P. Bowie was "a distinguished lawyer, who made a specialty of Spanish grants;" an allegation which, how-

ever, is not issuable, and which might probably have been made in favor of John P. himself.

Judicial experiences such as these were sufficient to impress on the courts the fact that every document written in the Spanish language did not necessarily import a perfect title to any part of the surface of the earth.

That the papers presented in this case show no title to any tract of land, is, in view of prior decisions of this court, perfectly obvious.

The exceptions to the documentary evidence raised the question of their admissibility just as it would have been raised on a motion to exclude under the old practice. They showed no title in the plaintiffs whatever.

I.

Up to the cession of Louisiana and for years afterward the lands at Hot Springs belonged to the Indians, and were not legally the subject of a grant by the governor of the Territory.

Chouteau *v.* Moloney, 16 How., 239.
Cherokee Nation *v.* Georgia, 5 Pet., 1.
U. S. *v.* Cook, 19 Wall, 591.
Leavenworth R. Co. *v.* U. S , 92 U. S., 742.
U. S. *v.* D'Anterrivo, 10 How., 626.

A Spanish grant of land occupied by Indians was not protected by the treaty of cession "unless the grantee had had open and notorious occupation of the land for

such a length of time as to raise a presumption that the Indians had notice of the claim at the date of the treaty."

March *v.* Brooks, 14 How., 513.

The care exercised by the Spanish government to prevent the irruption of white settlers on the lands of the Indians is shown by the Spanish laws and ordinances touching that matter.

5 Am. State Papers, 226, 231, 232, 234.

The Indian title was extinguished August 24, 1818.

Hot Springs Cases, 92 U. S., 703.

II.

There was no showing that if any survey was ever made it was returned and filed as required by the Twelfth Regulation of the Spanish governor, O'Reilly, made in 1770.

An account of this regulation will be found in U. S. *v.* Moore, 12 How., 217.

The Twelfth Regulation of O'Reilly, as governor of the Province of Louisiana, established February 18, 1770, is as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above mentioned four persons shall sign the *proces verbal*, which shall be made thereof. The surveyor shall make three copies of

the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant."

Copied also in United States *v.* Boisdoré, 11 Howard, 76.

Also in Vol. V, American State Papers, pp. 289, 290.

We see that by this regulation the following essential things were required to be done:

1. At the time of making the concession the governor should appoint a surveyor to fix the bounds of the land.

2. The judge ordinary of the district and two adjoining settlers should be present when the survey was made.

3. These four persons should make out a *proces verbal*, or detailed statement of the survey.

4. The surveyor should make three copies of this survey.

5. One copy the surveyor should deposit in the office of the scrivener (or clerk, or secretary) of the government.

6. He should direct a second copy to the governor general.

7. The third copy he should direct to the claimant or proprietor.

8. The latter should annex his copy to the title paper showing his grant.

No title could vest until a survey was made by the proper authority, nor until the grantee was put in possession of the tract defined by accurate boundaries.

U. S. *v.* Hughes, 13 How., 2.
U. S. *v.* Kingsley, 12 Pet., 476.
U. S. *v.* Wiggins, 14 id., 350.

Unless the document came from the proper archives it was not admissible in evidence.

White *v.* U. S., 1 Wall, 680.
Peralta *v.* U. S., 3 id., 440.

The pretended concession in this case is as follows:

"[*From the land archives.*]"

"The governor intendent of the provinces of Louisiana and Florida west, inspector of troops, etc.

"Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of this post of the Ouachita, of a tract of land of one square league, situated in the district of Arcansas, on the north side of the river Ouachita, at about two leagues and one-half distant from said river Ouachita, *and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters*, as is besides expressed by the figurative plan and certificate of said surveyor, Trudeau, above named, and recognizing this mode of measurement, we approve of this survey, using the faculty which the king has placed in us, and assign in his royal name unto the said

Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

"We give these presents under our own hand, sealed with the seal of our arms, and attested by the undersigned, secretary of his majesty in this government and intendence.

"In New Orleans, on the 22d of February, 1788.

"ESTEVAN MIRO.

"By mandate of his excellence.

"ANDRES LOPE[illegible] ARMESTO."

Without an official survey on the ground no title passed.

Glenn *v.* U. S., 13 How., 250.

Chouteau *v.* Moloney, 16 id., 234.

U. S. *v.* Cambuston, 20 id., 59.

U. S. *v.* Castro, 24 id., 346.

U. S. *v.* Morehead, 1 Black, 227.

U. S. *v.* Castillero, 2 id., 163.

As this document did not come from any official archives it proved nothing.

Peralta *v.* U. S., 3 Wall, 440.

Chouteau *v.* Moloney, 16 How., 234.

U. S. *v.* Castro, 24 id., 346.

U. S. *v.* Teschmaker, 22 id., 405.

U. S. *v.* Pico, id., 406.

U. S. *v.* Power, 11 id., 577.

U. S. *v.* Bolton, 23 id., 341.

Hot Springs Cases, 92 U. S., 713.

The instructions and regulations of Morales, dated July 17, 1799, made the requirements of the regulations of O'Reilly even more stringent and specific.

5 Am. State Papers, 291.

The supposed concession recites certain "anterior surveys;" but this amounts to nothing since "a recital in a grant that prerequisites had been complied with, is not sufficient ground for a presumption that they had been observed."

Fuentes *v.* U. S., 22 How., 443.

They could have been nothing but "chamber" or "conjectural" surveys, mere indications to the surveyor of the spot where the tract was to be surveyed. In 1788 but very few white men had ever been at the Hot Springs, which were then about as inaccessible as the interior of Africa is now.

In Fremont *v.* U. S., 17 How., 554, this court explained how such grants were made, when they were made at all.

"Grants of land in Louisiana and Florida were usually made in the following manner: The party who desired to form a settlement upon any unoccupied land *presented his petition to the officer who had authority to grant*, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied. Upon the receipt of the petition, the governor or other officer who had the power to grant, issued what is called a concession to the party, *authorizing him to have the land surveyed by the official surveyor*

of the province. And it was the duty of this officer to ascertain whether the land asked for was vacant, or the grant of it would prejudice the rights of other parties; and if the surveyor found it to be vacant, and that the grant would not interfere with the rights of others, he returned a plat, or figurative plan, as it was called, and the party thereupon received a grant in absolute ownership.

"These grants were almost uniformly made upon condition of settlement, or some other improvement by which the interest of the colony, it was supposed, would be promoted. *But until the survey was made, no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission, and nothing more.* But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. *But the examination of the surveyor, the actual survey, and the return of the plat, were conditions precedent, and he had no equity against the government, and no just claim to a grant until they were performed;* for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government. There were some cases, indeed, in which there were absolute grants of title with conditions subsequent annexed to them. The case of Arredondo, reported in 6 Pet., and of which we shall

speak hereafter, was one of this description. But the great mass of cases which come before this court, and which have been supposed to bear on this case, were of the character above mentioned."

In U. S. *v.* Vallejo, 1 Black, 451, the court said:

"We add, it is important also that a record should be made of these grants, so that the government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, are not deemed grants until the proper record is made.

"Without this guard, the officers making the grants, as in the present instance, the governor and secretary, would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the government without the means of information on the subject until the grant is produced from the pocket of the grantee."

The concession could have no value as a muniment of title until a survey should be made. "Nor could this be done by conjecture; lines and corners must be established by the finding so as to close the survey."

Denise *v.* Ruggles, 16 How., 243.

Hunnicutt *v.* U. S., 102 U. S., 359.

Delacroix *v.* Chamberlain, 12 Wheat., 601.

Purvis *v.* Harmonson, 4 La. An., 421.

Vilemont *v.* U. S., 13 How., 267.

S. C., Hempstead, 291.

Villalobos *v.* U. S., 10 How., 556.

U. S. *v.* Miranda, 16 Pet., 224.

U. S. *v.* Boisdoré, 11 How., 99.

"A grant delivered out for survey meant, not as with us, a perfect title; but an incipient right, which, when surveyed, required confirmation by the governor."

U. S. *v.* Boisdoré, 11 How., 99.

The manner of making the survey on the ground is particularly pointed out in Ellicott *v.* Pearl, 10 Pet., 441, Winter *v.* U. S., Hempst., 362, and U. S. *v.* Hanson, 16 Pet., 200.

A mere "chamber" survey will not suffice.

U. S. *v.* Lawton, 5 How., 26.

U. S. *v.* Delespine, 9 id., 83.

The thing granted must be so described as to distinguish it from all other things.

U. S. *v.* Delespine, id., 83.

Buyck *v.* U. S., 15 Pet., 225.

The treaty of cession has nothing to do with the case. Without the treaty the law would be the same.

Dent *v.* Emmeyer, 14 Wall, 312.

Unless there is a survey that perfectly identifies the land the concession is ineffectual.

Carondelet *v.* St. Louis, 1 Black, 179.

Whitney *v.* Frisbie, 9 Wall, 192.

Yosemite Valley Cases, 15 id., 87.

Shepley *v.* Cowan, 91 U. S., 238.

A league square of land on the north side of the Ouachita, at *about* two and a half leagues from that river describes nothing. A league square is not necessarily laid out in a square shape. The reference is to contents and not to form. A glance at the map of the land office will show that Spanish grants were very irregular in shape, having no regard even to the cardinal points of the compass.

When the documents were got up for the purposes of this suit it was doubtless thought that there was only one spring at the Hot Springs. Now the court judicially knows that there is a large number of hot springs at some distance apart.

1 Whart. Ev., sec. 339.

Counsel say that the springs shall be taken as a center. Which one?

But why should we take it that the spring, if there had only been one, should be the center of the tract? An argument of that kind was made in Lecompte *v.* U. S., 11 How., 125, and was emphatically rejected.

A grant which under the description given may, with equal propriety, be surveyed with commencement at several different points, is necessarily void.

U. S. *v.* Lawton, 5 How., 10.

Scull *v.* U. S., 98 U. S., 421.

Such a description is bad even after a confirmation by Congress.

Slidell *v.* Grandjean, 111 U. S., 413.
Ledoux *v.* Black, 18 How., 473.
Menard *v.* Massey, 8 id., 293.
Lafayette *v.* Blanc, 3 La. An., 59.
Flaker *v.* Doughty, 15 id., 673.
Arceneaux *v.* Benoit, 21 id., 673.
Snyder *v.* Sickles, 98 U. S., 203.
West *v.* Cochran, 17 id., 403.
Lander *v.* Brant, 10 id., 348.
U. S. *v.* Halleck, 1 Wall, 439.
Scull *v.* U. S., 98 U. S., 419.
Stanford *v.* Taylor, 18 How., 412.

Unless the instrument comes from proper archives there is no presumption of genuineness.

2 Whart. Ev., sec. 1359.
1 Green. Ev., sec. 21.

Until there was a survey made by the surveyor general, and the survey was recorded, there was no investure of title.

U. S. *v.* Lawton, 5 How., 26.

But the title was not good until the survey was confirmed by the governor.

U. S. *v.* Boisdoré, 11 How., 99.

III.

The certificate of Trudeau shows no such survey as was required by law.

As translated by the plaintiffs it reads as follows:

"Don Carlos Trudeau, land and particular surveyor

of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of his excellency, Don Estevan Miro, brigadier of the R. Ex. Gob., intendant of the province of Louisiana, West Florida, etc., dated the 22d of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters; and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of Ouachita River, in the district of Arkansas, at about two leagues and a half distance from said river, to be verified by the figurative plan which accompanies, in conformity with —— of the 6th of the present month of December, and of the current year 1788. (Signed) CARLOS TRUDEAU."

In one respect, though not to our detriment, the translation is plainly wrong. The words: *Don Carlos Trudeau, Agrimensor Real y Particular de la Provincia* de la Luisiana," do not mean "land and particular surveyor;" but they mean "royal and private surveyor."

Suffice it to say that this certificate does not purport to have been made by Trudeau in his official capacity. Hence it is valueless.

Johnson *v.* Staines, 2 Ohio, 55.

Cassele *v.* Cooke, 8 S. & R., 268; 11 Am. Dec., 611.

U. S. *v.* Hansen, 16 Pet., 199.

A certificate of what the surveyor had done without any survey would not be admissible in evidence.

1 Green. Ev., sec. 498.

The whole matter is summed up in Scull *v.* U. S., 98 U. S., 419.

"The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise.

"There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow, and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing de novo. The separation from the public domain must not be a new or conjectural separation, with any element of discretion or uncertainty."

IV.

The claim, if ever valid, is barred by the act of Congress of March 5, 1805.

This 4th section of the act is as follows:

"SEC. 4. And be it further enacted, that every person claiming lands in the above mentioned territories, by virtue of any legal French or Spanish grant, made and completed before the 1st day of October, 1800, and during the time the government which made such grant had the actual possession of the territories, may, and

every person claiming land in the said territories by virtue of the two first sections of this act, or by virtue of any grant or incomplete title bearing date subsequent to the 1st day of October, 1800, shall, before the 1st day of March, 1806, deliver to the register of the land office, or the recorder of land titles, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also on or before that day, deliver to the said register or recorder, for the purpose of being recorded, every grant, order or survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of 12½ cents for every 100 words contained in such written evidence of the claim: **Provided, however,** that where the lands are claimed by virtue of a **complete French or Spanish grant** as aforesaid, it shall not be necessary for the claimant to have **any other evidence of his claim recorded except the original grant or patent, together with the warrant, or order of survey and the plat,** but all other conveyances and deeds shall be deposited with the register or recorder, to be by them laid before the commissioners hereinafter directed to be appointed, when they shall take the claim into consideration. And if such person shall neglect to deliver such notice in writing of his claim, together with a plat as

aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred: nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, *which shall not be recorded as above directed*, ever after be considered or admitted as evidence in any court of the United States, against any grant derived from the United States."

The time for filing the evidence of the grants was extended in 1806, 1807 and 1811; but the time granted by the last extension has long since expired.

V.

The claim is barred by the act of Congress known as the Hot Springs Act.

Under the provisions of the act of June 11, 1870 (16 Stat., 149), all persons claiming title, either legal or equitable, "to the whole or any part of the four sections of land constituting what is known as the Hot Springs Reservation, in Hot Spring County, in the State of Arkansas," had an opportunity to institute suit, in the nature of a bill in equity, against the United States in the Court of Claims, "and prosecute to final decision any suit that may be necessary to settle the same; *provided*, that no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall be not brought under the provision of this act within that time shall be forever barred."

It seems to be plain that when the Hot Springs Reservation Act of 1832 was passed the plaintiffs "had no vested interest in the land which a court of justice could recognize. Then the United States government was the legal owner, and had the power to reserve it from sale."

Hale *v.* Gaines, 22 How., 161.

VI.

The claim is barred under the act of Congress of May 26, 1824.

This is an act entitled "An act enabling claimants to lands within the limits of the State of Missouri and the Territory of Arkansas to institute proceedings to try the validity of their claims" (4 Stats., 52). It provided for the adjustment of all claims arising out of Spanish and French grants by petitions to be filed by the claimants in the district courts of the United States. The fifth section is as follows:

Sec. 5. And be it further enacted, That any claim to lands, tenements or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and (in) equity, and no other action, at common law, or

proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claims."

The laws prevailing in Louisiana before the cession "must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other State."

U. S. *v.* Turner, 11 How., 668.

The plaintiffs contend that they are not barred by either this act or the act of 1805, because they say that as their claim was a perfect one it was not within the purview of either. It is not necessary to discuss that question; since, if this title is a perfect one, there could not be such a thing as an imperfect one; and the act of Congress was a nullity.

VII.

After such a great lapse of time it must be presumed that the claim, if it ever had any validity, was long ago abandoned.

Pontalba *v.* Copland, 3 La. An., 87.

Gonsolin *v.* Brashear, 8 Martin, 35.

Fuentes *v.* U. S., 22 How., 460.

U. S. *v.* Moore, 12 id., 222.

U. S. *v.* Repentigny, 5 Wall, 211.

U. S. *v.* Hughes, 13 How., 3.

Valliere *v.* U. S., Hempst., 338.

People *v.* Clark, 10 Barb., 120.

It is of course impossible now to prove the signature of Miro or of Trudeau, or to disprove them.

VIII.

The claim is barred by the State statute of limitations.

This for the recovery of lands is seven years.

Ark. Dig. St., 1894, sec. 4815.

Usually the defense of the statute of limitations cannot be interposed by demurrer in cases at law; but where the complaint shows that a sufficient time has elapsed to bar the cause of action, and also the non-existence of any ground of avoidance, a demurrer will lie.

Collins *v.* Mack, 31 Ark., 684.

Dowell *v.* Tucker, 46 id., 452.

There is a saving in favor of infants, married women and insane persons; but such disabilities do not last forever.

Respectfully,

U. M. Rose,

G. B. Rose,

For Defendant in Error.